Supreme Court U.S.
FILED
MAY 23 2002
OFFICE OF THE CLERK

No. 01-1648

IN THE

Supreme Court of the United States

LONNIE GLOVER AND DAWN GLOVER,
AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

STANDARD FEDERAL BANK
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

DALE I. LARSON*
LARSON KING, LLP
2800 Minnesota World Trade Center
30 East Seventh Street
Saint Paul, Minnesota 55101
(651) 312-6500

Counsel for Respondent

* Counsel of Record

May 23, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the court of appeals properly decertified a class suing under Section 8 of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607(a), by according both *Seminole Rock* and *Skidmore* deference to a "clarif[ying]" policy statement of the Department of Housing and Urban Development, which declares that each payment by a lender of a "yield spread premium" to a mortgage broker must be examined case-by-case to determine whether services, goods or facilities were rendered and the broker's total compensation was reasonable.

PARTIES TO THE PROCEEDING

The petition properly identifies the parties to this proceeding. Pursuant to Rule 29.6 of the Rules of this Court, Standard Federal Bank states:

ABN AMRO North America, Inc., owns 100% of the shares in Standard Federal Bank, N.A.*;

ABN AMRO North America Holding Company owns 100% of the shares of ABN AMRO North America, Inc.;

ABN AMRO Bank N.V. owns 100% of the shares in ABN AMRO North America Holding Company;

ABN AMRO Holding N.V. owns 100% of the shares of ABN AMRO Bank N.V.; and

ABN AMRO Holding N.V. is publicly traded in Europe and is traded in the United States as American Depository Receipts.

---

* ABN AMRO Mortgage Group, Inc. is a wholly owned subsidiary of Standard Federal Bank, N.A. and was added as a defendant below on an alter ego theory of liability only. It was not a direct participant before the court of appeals.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
1. Statutory and Regulatory Background	2
2. Facts And Proceedings Below	9
REASONS FOR DENYING THE PETITION	12
CONCLUSION	22

TABLE OF AUTHORITIES

CASES Page

Aiea Lani Corp. v. Hawaii Escrow & Title, Inc., 647 P.2d 257 (Haw. 1982) 17
Alaska Prof'l Hunters Ass'n v. FAA, 177 F.3d 1030 (D.C. Cir. 1999) 21
Auer v. Robbins, 519 U.S. 452 (1997) 11, 19
Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) 11, 19
Brancheau v. Residential Mortgage, 187 F.R.D. 591 (D. Minn. 1999) 7
Briggs v. Countrywide Funding Corp., 188 F.R.D. 645 (M.D. Ala. 1999), *petition for review stayed*, (11th Cir. Nov. 29, 1999) 6
Buckley v. Firstar Home Mortgage, No. 98 C 5092, 1999 U.S. Dist. LEXIS 21511 (N.D. Ill. Aug. 26, 1999) 7
Burgan v. First Nationwide Mortgage Corp., No. C-98-1819-Z (W.D. Wash. May 25, 1999) 7
Christensen v. Harris County, 529 U.S. 576 (2000) 11, 19
Culpepper v. Inland Mortgage Corp., 132 F.3d 692 (11th Cir. 1998) 10
Culpepper v. Irwin Mortgage Corp., 253 F.3d 1324 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 930 (2002) 7, 8, 16
Empalmado v. First Franklin Fin. Corp., No. 01 C 1117, 2001 WL 1155081 (N.D. Ill. Sept. 27, 2001) 7
Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 13
Emory v. Delta Funding Corp., 190 F.R.D. 627 (N.D. Ga. 1999) 6
Golon v. Ohio Sav. Bank, No. 98 C 7430, 1999 WL 965593 (N.D. Ill. Oct. 15, 1999), *petition for review denied*, (7th Cir. Nov. 16, 1999) 7

TABLE OF AUTHORITIES – continued

Page

Hamilton v. North Am. Mortgage Co., No. 98-58-P-H, 1999 WL 33117170 (D. Me. July 26, 1999) 7

Hirsch v. BankAmerica Corp., No. 1:98-CV-1032-ODE, 1999 U.S. Dist. LEXIS 22599 (N.D. Ga. Apr. 20, 1999), *petition for review granted*, (11th Cir. June 9, 1999) 7

Isara v. Community Lending, Inc., No. 99-00130SPK (D. Haw. Jan. 19, 2000) 7

Kroskin v. Aggressive Mortgage Corp., No. 98-600 (MJD/AJB), 1999 U.S. Dist. LEXIS 21517 (D. Minn. July 12, 1999), *petition for review denied*, (8th Cir. Aug. 12, 1999) 7

LaCasse v. Washington Mut., Inc., No. C01-1352Z, 2002 WL 554414 (W.D. Wash. Mar. 15, 2002) 7

Lawyers Title Ins. Corp. v. Dearborn Title Corp., 118 F.3d 1157 (7th Cir. 1997) 17

Lee v. NF Invs., Inc., No. 4:99CV426 ERW, 2000 U.S. Dist. LEXIS 20712 (E.D. Mo. Mar. 15, 2000) 7

Levine v. North Am. Mortgage Co., No. 98-556 (JRT/RLE), 2000 U.S. Dist. LEXIS 21403 (D. Minn. May 17, 2000) 7

Levine v. North Am. Mortgage Co., 188 F.R.D. 320 (D. Minn. 1999), *petition for review denied*, (8th Cir. July 28, 1999) 7

McBride v. ReliaStar Mortgage Corp., No. 1:98-CV-215-TWT, 1999 U.S. Dist. LEXIS 21654 (N.D. Ga. Apr. 29, 1999), *petition for review granted*, (11th Cir. July 8, 1999) 6

TABLE OF AUTHORITIES – continued

Page

Medlock v. Chase Manhattan Mortgage Corp., No. 1:98-CV-1927-RWS, 1999 U.S. Dist. LEXIS 19937 (N.D. Ga. Apr. 16, 1999), *petition for review denied*, (11th Cir. June 15, 1999) 7

In re Old Kent Mortgage Co. Yield Spread Premium Litig., 191 F.R.D. 155 (D. Minn. 2000) 7

Paul v. National City Mortgage Co., No. 1:98-CV-216-WBH, 1999 U.S. Dist. LEXIS 20512 (N.D. Ga. Mar. 11, 1999) 7

Potchin v. Prudential Home Mortgage Co., No. 97-CV-525 (CBA), 1999 WL 1814612 (E.D.N.Y. Nov. 12, 1999), *appeal dismissed*, (2d Cir. Nov. 1, 2001) 7

Richter v. Banc One Mortgage Corp., No. CIV 97-2195 PHX RCB, 1999 U.S. Dist. LEXIS 16074 (D. Ariz. Mar. 19, 1999), *petition for review denied*, (9th Cir. June 18, 1999) 6

Risher v. Crestar Mortgage Corp., No. 2:99-2637-23, 2001 U.S. LEXIS 14449 (D.S.C. Mar. 30, 2001) 7

Sims v. First Franklin Fin. Corp., No. 01 C 1116, 2001 WL 1155271 (N.D. Ill. Sept. 28, 2001) 7

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 11, 20

United States v. Mead Corp., 533 U.S. 218 (2001) 19, 20

Vargas v. Universal Mortgage Corp., No. 01 C 0087, 2001 WL 1545874 (N.D. Ill. Nov. 29, 2001) 7

Williams v. Paycor Mortgage Corp., No. 01 C 255 (N.D. Ill. Sept. 18, 2001) 7

TABLE OF AUTHORITIES – continued

Page

Yasgur v. Aegis Mortgage Corp., No. 98-CV-121 (JMR/FLN), 1999 U.S. Dist. LEXIS 20989 (D. Minn. Mar. 9, 1999), *petition for review denied*, (8th Cir. Apr. 6, 1999) 7

STATUTES AND REGULATIONS

12 U.S.C. § 2601(b)2 2
§ 2607 ..... 4, 12
§ 2617 ..... 4, 20
24 C.F.R. § 3500.14(b) 4
Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed. Reg. 53052 (Oct. 18, 2001) ..... *passim*

LEGISLATIVE HISTORY

H.R. Conf. Rep. No. 105-769 (1998) 4

SCHOLARLY AUTHORITY

Robert L. Stern et al., *Supreme Court Practice* (7th ed. 1993) 14

IN THE

Supreme Court of the United States

01-1648

LONNIE GLOVER AND DAWN GLOVER,
AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

STANDARD FEDERAL BANK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

Respondent Standard Federal Bank hereby opposes the petition for a writ of certiorari filed in the above-captioned case.

STATEMENT OF THE CASE

At issue in this case is the propriety of the court of appeals' decision to decertify petitioners' case as a class action. Nonetheless, petitioners raise no class action issues; instead, they urge the Court to use this vehicle to decide the question of the standards of liability under Section 8 of RESPA. For reasons described below, the issue of liability is not fully and adequately presented in the class action context and thus the petition should be denied. To understand why the issues petitioners purport to present should be decided in a case actually involving substantive liability (and not class

certification), it is useful to understand the inherently complex legal problems posed by the application of Section 8 of RESPA to any particular case and the limited record that exists in this case.

1. Statutory and Regulatory Background.

A. RESPA was enacted in 1974. It was intended, in part, to eliminate "kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(2).

When RESPA was signed into law, the process of obtaining a mortgage was relatively simple. Most homeowners acquired their mortgage from a local savings and loan, a commercial bank or a mortgage banker and those mortgages were held by the institution for the life of the loan. HUD Policy Statement, 1999-1, Pet. App. 129a. In the next two decades, an entire secondary market for mortgages was created, which prompted numerous wholesale and retail entities to enter the market for mortgage financing. In turn, this development created a market for mortgage brokers. "These entities serve as intermediaries between the consumer and the entity funding the loan," and their role is to "work[] with prospective borrowers, collect[] application information, and otherwise process[] the data required to complete the mortgage transaction." *Id.*[1] Of course, these services are not without cost and those costs ultimately are borne by the borrowers.

---

[1] In its 1999 Policy Statement, HUD described the myriad services and facilities supplied by mortgage brokers as follows:

> Mortgage brokers provide various services in processing mortgage loans, such as filling out the application, ordering required reports and documents, counseling the borrower and participating in the loan closing. They may also offer goods and facilities, such as reports, equipment, and office space to carry out their functions.

Pet. App. 130a.

As the Department of Housing and Urban Development has explained, "One of the primary barriers to homeownership and homeowners' ability to refinance and lower their housing costs is the up front cash needed to obtain a mortgage."[2] Pet. App. 95a. At issue here is a method of permitting lenders to pay for some or all of the closing costs, including brokers' fees.[3] The payments to the brokers by lenders are generally referred to as "yield spread premiums."

The lender pays the premium to the broker, which allows him "to recoup the up front costs incurred on the borrower's behalf in originating the loan." HUD Statement of Policy, 2001-1, 66 Fed. Reg. 53052, 53054 (Oct. 18, 2001), Pet. App. 96a. The determination of the premium is derived from daily rate sheets.[4] They set forth the amount the lender will pay a broker in connection with various types of mortgage loans. HUD "believes, and industry and consumers agree, that a yield spread premium can be a useful means to pay some or all of a borrower's settlement costs." *Id.* More generally, "[t]he availability of this option fosters homeownership." *Id.*

B. The legal question posed by these premiums arises out of the ambiguity in Section 8 of RESPA, which prohibits any

---

[2] Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed. Reg. 53052 (Oct. 18, 2001) ("HUD Statement of Policy, 2001-1"), Pet. App. 88a-116a.

[3] Obviously, broker compensation and other closing costs can be paid out-of-pocket at closing or they can be financed simply by adding the fees to the loan, if permitted by the loan-to-value ratios. Many borrowers, however, prefer to finance their closing costs through the yield spread premium because interest is deductible and many borrowers prefer to retain more cash. Pet. App. 95a-96a.

[4] The premium is sometimes based on the interest rate of the loan to the extent it is above "par," which is a benchmark rate where neither yield spread premiums are paid by the lender nor discount points are paid usually by the borrower. Pet. App. 4a.

person from giving or accepting "any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to . . . a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a). Obviously, some kinds of payments by lenders to brokers could violate this prohibition. The inquiry is complicated by Section 8(c), which states that "[n]othing in this section shall be construed as prohibiting . . . (2) . . . payment for goods or facilities actually furnished or for services actually performed." *Id.* § 2607(c). On its face, this language shelters a lender from liability for paying a yield spread premium so long as it constitutes a payment for goods or facilities actually furnished or services actually rendered by a broker. In sum, the language of the statute neither condemns per se nor approves per se yield spread premiums. For their part the regulations implementing Section 8 of RESPA do not directly address this issue. *See* 24 C.F.R. § 3500.14(b).

In addition to rulemaking authority, the Secretary of HUD is expressly authorized in Section 19(a) of RESPA, "to make such interpretations . . . as may be necessary to achieve the purposes of" the statute. 12 U.S.C. § 2617(a).[5] In recognition of this authority, Congress by a Conference Committee expressly directed HUD to clarify its position with respect to lender payments to mortgage brokers within 90 days after HUD's annual appropriation was approved in the FY 1999 HUD Appropriations Act. H.R. Conf. Rep. No. 105-769, at 260 (1998) ("Congress never intended payments by lenders to mortgage brokers for goods or facilities actually furnished or for services actually performed to be violations of" Section 8(a) of RESPA.).

---

[5] Section 19(b) provides a corresponding safe harbor for action undertaken "in good faith in conformity with any . . . interpretation thereof by the Secretary" even if the interpretation is later "amended, rescinded" or declared invalid for any reason. 12 U.S.C. § 2617(b).

Pursuant to this directive and to provide guidance to the mortgage industry on the applicability of Section 8 to the lender-broker relationship, which is involved in approximately half of all mortgages made each year in this country (Pet. App. 129a), HUD issued its Policy Statement "regarding lender payments to mortgage brokers." HUD Policy Statement, 1999-1, Pet. App. 126a-156a. In the 1999 Policy Statement, HUD by way of clarification stated that it "does not consider such payments (*i.e.*, yield spread premiums or any other class of named payments) to be illegal *per se*." *Id.* at 143a. Accordingly, HUD adopted a two-part test to determine legality.

"[T]he first question is whether goods or facilities were actually furnished or services were actually performed for the compensation paid." Pet. App. 143(a). But the inquiry is more probing than simply a determination as to whether any services were provided.

Instead, the Policy Statement requires a loan-specific, fact intensive analysis of 14 different "services" a broker may provide to justify compensation paid in the form of a yield spread premium by a wholesale lender. Pet. App. 145a-146a. These include: "filling out the application, ordering required reports and documents, counseling the borrower and participating in the loan closing." *Id.* at 130a. Under HUD's Policy Statement, step one is satisfied if the broker takes the loan application and performs at least five of the 14 "compensable" services. *Id.* at 146a. The Policy Statement also identifies the kinds of "goods" and "facilities" for which compensation may be paid by the lender to the broker:

> For example, appraisals, credit reports, and other documents required for a complete loan file may be regarded as goods, and a reasonable portion of the broker's retail or "store-front" operation may generally

> be regarded as a facility for which a lender may compensate a broker.

Id. at 148a.

If the broker provided the proper number and type of goods, facilities or services, then the liability analysis moves to step two. This step raises fact-intensive and loan-specific questions as well. According to HUD, a lender satisfies step two by presenting evidence that the "total compensation" the broker received is "reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed." Pet. App. 148a.

HUD considers this second step the "*determinative test under RESPA*." Pet. App. 148a (emphasis added). "Total compensation" means the broker's compensation from all sources, including "direct origination" and other fees paid by the borrower, and any "indirect fees" from the lender (*e.g.*, a yield spread premium) even though ultimately paid by the borrower through a higher interest rate. *Id.* Under step two, this "total compensation" must be "commensurate with that amount normally charged for similar services, goods or facilities. This analysis requires careful consideration of fees paid in relation to price structures and practices in similar transactions and in similar markets." *Id.* at 149a. Any amount over the market rate "may be used as evidence of a . . . violation of . . . RESPA." *Id.*

HUD's 1999 Policy Statement succeeded admirably in promoting consistency in judicial decisionmaking. In dozens of opinions[6] the Policy Statement's two-part analysis assisted

---

[6] *See Briggs v. Countrywide Funding Corp.*, 188 F.R.D. 645 (M.D. Ala. 1999), *petition for review stayed*, (11th Cir. Nov. 29, 1999); *Richter v. Banc One Mortgage Corp.*, No. CIV 97-2195 PHX RCB, 1999 U.S. Dist. LEXIS 16074 (D. Ariz. Mar. 19, 1999), *petition for review denied*, (9th Cir. June 18, 1999); *Emory v. Delta Funding Corp.*, 190 F.R.D. 627 (N.D. Ga. 1999); *McBride v. ReliaStar Mortgage Corp.*, No. 1:98-CV-215-TWT, 1999 U.S. Dist. LEXIS 21654 (N.D. Ga. Apr. 29, 1999), *petition*

the courts in deciding how to proceed with RESPA claims and in each instance class certification was denied. The only significant departure from this consistency was the Eleventh Circuit's decision in *Culpepper v. Irwin Mortgage Corp.*, 253

---

for review granted, (11th Cir. July 8, 1999); *Hirsch v. BankAmerica Corp.*, No. 1:98-CV-1032-ODE, 1999 U.S. Dist. LEXIS 22599 (N.D. Ga. Apr. 20, 1999), *petition for review granted*, (11th Cir. June 9, 1999); *Medlock v. Chase Manhattan Mortgage Corp.*, No. 1:98-CV-1927-RWS, 1999 U.S. Dist. LEXIS 19937 (N.D. Ga. Apr. 16, 1999), *petition for review denied*, (11th Cir. June 15, 1999); *Paul v. National City Mortgage Co.*, No. 1:98-CV-216-WBH, 1999 U.S. Dist. LEXIS 20512 (N.D. Ga. Mar. 11, 1999); *Isara v. Community Lending, Inc.*, No. 99-00130SPK (D. Haw. Jan. 19, 2000); *Vargas v. Universal Mortgage Corp.*, No. 01 C 0087, 2001 WL 1545874 (N.D. Ill. Nov. 29, 2001); *Sims v. First Franklin Fin. Corp.*, No. 01 C 1116, 2001 WL 1155271 (N.D. Ill. Sept. 28, 2001); *Empalmado v. First Franklin Fin. Corp.*, No. 01 C 1117, 2001 WL 1155081 (N.D. Ill. Sept. 27, 2001); *Williams v. Paycor Mortgage Corp.*, No. 01 C 255 (N.D. Ill. Sept. 18, 2001); *Golon v. Ohio Sav. Bank*, No. 98 C 7430, 1999 WL 965593 (N.D. Ill. Oct. 15, 1999), *petition for review denied*, (7th Cir. Nov. 16, 1999); *Buckley v. Firstar Home Mortgage*, No. 98 C 5092, 1999 U.S. Dist. LEXIS 21511 (N.D. Ill. Aug. 26, 1999); *Hamilton v. North Am. Mortgage Co.*, No. 98-58-P-H, 1999 WL 33117170 (D. Me. July 26, 1999); *In re Old Kent Mortgage Co. Yield Spread Premium Litig.*, 191 F.R.D. 155 (D. Minn. 2000); *Levine v. North Am. Mortgage Co.*, No. 98-556 (JRT/RLE), 2000 U.S. Dist. LEXIS 21403 (D. Minn. May 17, 2000); *Levine v. North Am. Mortgage Co.*, 188 F.R.D. 320 (D. Minn. 1999), *petition for review denied*, (8th Cir. July 28, 1999); *Brancheau v. Residential Mortgage*, 187 F.R.D. 591 (D. Minn. 1999); *Kroskin v. Aggressive Mortgage Corp.*, No. 98-600 (MJD/AJB), 1999 U.S. Dist. LEXIS 21517 (D. Minn. July 12, 1999), *petition for review denied*, (8th Cir. Aug. 12, 1999); *Yasgur v. Aegis Mortgage Corp.*, No. 98-CV-121 (JMR/FLN), 1999 U.S. Dist. LEXIS 20989 (D. Minn. Mar. 9, 1999), *petition for review denied*, (8th Cir. Apr. 6, 1999); *Lee v. NF Invs., Inc.*, No. 4:99CV426 ERW, 2000 U.S. Dist. LEXIS 20712 (E.D. Mo. Mar. 15, 2000); *Potchin v. Prudential Home Mortgage Co.*, No. 97-CV-525 (CBA), 1999 WL 1814612 (E.D.N.Y. Nov. 12, 1999), *appeal dismissed*, (2d Cir. Nov. 1, 2001); *Risher v. Crestar Mortgage Corp.*, No. 2:99-2637-23, 2001 U.S. Dist. LEXIS 14449 (D.S.C. Mar. 30, 2001); *LaCasse v. Washington Mut., Inc.*, No. C01-1352Z, 2002 WL 554414 (W.D. Wash. Mar. 15, 2002); *Burgan v. First Nationwide Mortgage Corp.*, No. C-98-1819-Z (W.D. Wash. May 25, 1999).

F.3d 1324 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 930 (2002). That court concluded that HUD's Policy "Statement is ambiguous, . . . permitting the parties to read it in importantly different ways." *Id.* at 1327. The court proceeded to analyze the Section 8 issue largely in terms of HUD's 1999 Policy Statement. Relying heavily on the phrase "for compensation paid" in HUD's first-step inquiry into whether services, goods or facilities were actually provided by a broker, the Eleventh Circuit concluded that HUD's Statement could be read to focus the Section 8 inquiry solely on the lender. Thus, when the lender issues a rate sheet with a yield spread premium included, the failure of the lender to "negotiate[] yield spread premiums loan-by-loan" could create an inference in all cases that the fee is for a referral. *Id.* at 1332.

Although the Eleventh Circuit purported to interpret HUD's 1999 Policy Statement, the court's reasoning was manifestly inconsistent with that Statement, and accordingly, HUD responded promptly to eliminate any confusion. HUD categorically rejected the court's argument that the 1999 Policy Statement supported an analysis that "focus[es] exclusively on the presumed intent of the lender in making the payments." HUD Statement of Policy, 2001-1, 66 Fed. Reg. at 53054, Pet. App. 99a. To the contrary, HUD relied upon "common industry practice" pursuant to which "lenders typically know that brokers have performed the services required." 66 Fed. Reg. at 53055, *id.* at 100a. Thus, to balance the borrowers', brokers' and lenders' legitimate interests, HUD retained its two-part test that (1) permits scrutiny of the actual services the broker performed based on HUD's non-exhaustive list in the 1999 Statement and (2) considers the overall reasonableness of the broker's total compensation compared "to the total set of goods or facilities actually furnished or services performed." *Id.* at 101a. In sum, HUD's 2001 Policy Statement "clarifie[d] its interpretation of Section 8" embodied in the 1999 Statement

and "the test for the legality of [yield spread premium] payments." 66 Fed. Reg. at 53052, *id.* at 88a-89a.

2. Facts And Proceedings Below.

In 1996, petitioners Lonnie and Dawn Glover refinanced an existing loan on their residence. This transaction was brokered by Heartland Mortgage and financed by respondent. Pet. App. 2a. Because the case comes here from an interlocutory appeal of class certification, the facts described by the courts below in deciding class certification are minimal.

Petitioners' mortgage contained an above par interest rate and Heartland was paid a yield spread premium by respondent. The amount of that payment, styled as a "[s]ervice release premium to Heartland Mortgage paid by [respondent]," was explicitly disclosed in petitioners' settlement statement. Pet. App. 212a. Nothing in the opinions below further discusses the relationship among petitioners, Heartland and respondent involved in this transaction.

A. In September 1997, petitioners commenced this suit as a putative class action against respondent and Heartland, alleging that the yield spread premium paid to Heartland violated Section 8 of RESPA. The district court issued three separate class certification orders. The first order (Pet. App. 43a-52a) denied petitioners' motion for class certification. This order employed the analysis of HUD's 1999 Policy Statement and the result was consistent with dozens of previously issued opinions (*see supra* note 6) denying class status in other yield spread premium cases. *Id.* at 50a (citing cases).

Seven months later, the district court issued its second class certification order (Pet. App. 26a-42a) in response to petitioners' "renewed" motion for class certification. This order reversed the earlier one and certified a class explicitly "defined as all people obtaining a mortgage brokered by

Heartland and financed by [respondent]." *Id.* at 36a. This single-broker class included approximately 75 Minnesota loans. In reconsidering its earlier order, the district court reasoned that the 1999 HUD Policy Statement "is open to interpretation" and thus felt free to adopt what the court described as the "*Culpepper* test,"[7] focusing solely on the lender.

Six months later, the district court changed its class certification for a third time in just over a year and dramatically expanded the definition of the class. Pet. App. 21a-23a. The court abandoned the single-broker class and defined the class as all "'people [who] obtain[ed] a mortgage . . . financed by [respondent] and brokered by any mortgage broker.'" *Id.* at 23a. This nationwide class encompasses potentially hundreds of thousands of loans, originated by thousands of brokers.

After the district court ruled and before the Eighth Circuit decided the issue, HUD issued its 2001 Policy Statement. As previously explained (*supra* at 8), that Statement clarified and supplemented the 1999 Policy Statement by making unambiguous HUD's understanding that Section 8 requires a two-step inquiry into whether legitimate services, goods or facilities were furnished by the broker and whether the broker's total compensation was reasonable under the circumstances. HUD Statement of Policy, 2001-1, 66 Fed. Reg. at 53054-55, Pet. App. 99a-101a. In this regard, HUD was very explicit that the inquiry must be conducted on a loan-by-loan basis and consider more than the actions of the lender, thus rejecting the holding of the Eleventh Circuit in *Culpepper* and the district court's reasoning in this case. 66 Fed. Reg. at 53054, *id.* at 99a.

---

[7] The district court's reference was to the Eleventh Circuit's earlier opinion ruling on summary judgment in *Culpepper v. Inland Mortgage Corp.*, 132 F.3d 692 (11th Cir. 1998).

B. The court of appeals granted respondent's Rule 23(f) petition for immediate review of the district court's class certification order and unanimously reversed. Pet. App. 1a-20a. The Eighth Circuit focused its analytical attention on HUD's 2001 Policy Statement clarifying and supplementing the 1999 Statement, reasoning that "[w]hether or not we follow HUD's Policy Statements is dispositive in this case." Of course, the Eighth Circuit had the benefit of HUD's clarification embodied in the 2001 Policy Statement and HUD's expressed "disagreement with the judicial interpretation regarding . . . the 1999 Statement of Policy as set forth in Culpepper." *Id.* at 8a.

In deciding to defer to HUD's interpretation, the Eighth Circuit first recognized that Section 8 of RESPA does not directly address the legality of yield spread premiums and second that HUD's regulation "simply mirrors" the statute. Pet. App. 11a. The court then examined the proper rule to follow when the agency is called upon to interpret its own ambiguous regulation. Relying on two independent lines of this Court's authority, the court of appeals concluded that it should defer to HUD's interpretation requiring a loan-by-loan analysis of the lawfulness of a yield spread premium under Section 8. First, the court relied upon *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945) and its progeny – *Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) – for the proposition that an agency's interpretation of its own ambiguous regulation is entitled to judicial deference. Second, the court held that deference was warranted under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), because HUD's Policy Statements "reflect a reasoned view" derived from "a body of experience and informed judgment" and thus deserve judicial respect. Pet. App. 14a.

With regard to the Eleventh Circuit's opinion in *Culpepper*, the court found it inapposite because it did not have the benefit of the intervening policy statement of HUD. The

court here interpreted *Culpepper* as having "given at least some deference to HUD policy pronouncements" and thus questioned whether the Eleventh Circuit would remain "steadfast" in its interpretation of Section 8 once it had the benefit of HUD's most recent exposition of the issue. Pet. App. 16a n.9

The court of appeals independently examined HUD's 2001 Policy Statement and concluded that the two-part test effectively enforced the language and purpose of Section 8. First, the court below recognized that petitioners' expansive interpretation "puts . . . no emphasis on the permissive language of Section 8(c)."[8] Pet. App. 17a. Thus, under petitioners' approach, yield spread premiums would be rendered per se illegal, which Congress clearly did not intend. Second, HUD's approach recognizes that lenders generally do not need to conduct loan-specific inquiries to set rates that reasonably reflect the value of the efforts of brokers. *Id.* at 17a. Finally, the court of appeals noted that classwide relief is not required to ensure that RESPA is properly enforced. "Congress has guaranteed legal representation under RESPA by permitting attorneys fees and costs as part of each allowable recovery." 12 U.S.C. § 2607(d)(5). The court concluded that "a class action is not necessary for justice to be done." Pet. App. 19a.

REASONS FOR DENYING THE PETITION

This is not a case involving the standards to be applied in determining a bank's or broker's liability under Section 8 of RESPA. This is a case involving class certification. To be

---

[8] The court of appeals also found support for a loan-by-loan inquiry in the remedy provision of RESPA, which permits damages "equal to three times the amount of any charge paid for such settlement service." 12 U.S.C. § 2607(d)(2). The court read this to mean that there must "be a determination of which settlement services are provided in connection with each real estate settlement." Pet. App. 19a.

sure, there is some overlap between the merits of a litigated dispute and the propriety of proceeding in the matter as a class. But the petition in this case could not more flatly conflict with this Court's admonition against undertaking "a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). At the end of the day, all that petitioners are asking this Court to do is decide the proper interpretation of Section 8. Indeed, they even go so far as to ask this Court to take the first look at depositions and presumably make factual determinations as part of its review process. Class certification is inherently interlocutory and thus serves as a woefully inadequate vehicle for deciding the proper interpretation of any statute.

Even if the vehicle were a more suitable one for deciding the proper meaning of Section 8 of RESPA, this is clearly not the right time. The only arguable conflict among the circuits on the issue is significantly affected by HUD's intervening Policy Statement. It is entirely possible that the courts will line up uniformly behind HUD now that it has "clarified" its position. Certainly, there is no reason for this Court in a class certification proceeding to entertain any of petitioners' extravagant administrative law issues. RESPA confers extraordinary authority on the Secretary of HUD to construe its provisions beyond his rulemaking powers, which makes the *Seminole Rock* issue completely unique and thus unworthy of certiorari. As for *Skidmore* deference, that is an inherently limited issue. The court of appeals unquestionably applied the proper legal standard and petitioners' quarrel amounts to nothing but carping over the number of words the court of appeals used to explain its decision to defer to HUD's experience and expertise. In sum, no reason exists for the Court to decide the questions presented in this case at this time. The petition should be denied.

I.

A. Petitioners' first argument (Pet. 12-20) nominally raises an issue concerning class certification, but the real issue on which they seek review is strictly the proper standard for determining liability under Section 8 of RESPA. There is no question here involving either the interpretation or application of Fed. R. Civ. P. 23. What petitioners make no effort to explain is why the Court should grant review of a hopelessly interlocutory ruling on class certification rather than wait for a case in which a lender's or broker's liability has been finally adjudicated. *See* Robert L. Stern et al., *Supreme Court Practice* 195-96 (7th ed. 1993). Just as the Court routinely refuses to decide issues presented in a preliminary injunction setting, it should decline to use a class action vehicle for deciding the meaning of Section 8.[9]

Even if an argument could be made that in some cases it would be appropriate for this Court to decide the substantive standards of liability purely in a class action context, this case would not qualify. Here, the class decision was rendered by both courts below on the basis of virtually no factual development. All that those courts took into account was the following: petitioners refinanced their mortgage using a broker that received a yield spread premium from respondent on a loan that was above par. Pet. App. 2a, 27a. That is all.

The clearest proof that this record is ill suited to deciding the broader issues arising under Section 8 is petitioners' discussion (Pet. 8) of snippets from depositions in an attempt

---

[9] Even if petitioners were to prevail on their interpretation of Section 8, that would not finally resolve the class certification issue in this case. Respondent argued in the court of appeals that individual claims are a superior method of resolving these cases in light of the full range of remedies available to individual RESPA plaintiffs. The court of appeals did not address this alternative argument, although the court acknowledged the lack of any need for plaintiffs to proceed as a class in light of 12 U.S.C. § 2607(d)'s remedial scheme. Pet. App. 19a.

to bolster their assertion that respondent somehow conceded that its yield spread premium payments were not intended to compensate brokers for the services they rendered Not surprisingly there is conflicting evidence on this issue.[10] But what is more important for present purposes is that this issue has never been addressed, much less resolved, by the courts below. This kind of evidentiary dispute is precisely the kind of issue that should be tried on the merits and then subject to certiorari review to determine the proper legal standards to apply with the benefit of a full factual record and findings of fact. That is not the situation presented here.

What makes the development of the record particularly critical is the recognition by all concerned that yield spread premiums are neither per se legal nor per se illegal. Pet. App. 16a ("Glovers profess . . . YSPs are not 'per se' illegal"). Thus, a precise understanding of the role of premiums in a particular case will unquestionably inform the Court's

---

[10] Petitioners misstate the testimony. One officer actually testified that yield spread premiums are payments "in exchange for goods and services and facilities that are performed by the broker." Newman Dep. at 144-45, Lindahl Aff. Ex. 2; *see also id.* at 149-53, 179, 189-91, 203-04, 279, 281. In fact, all of respondent's witnesses have repeatedly so testified. *See, e.g.*, Conner Dep. at 201-06, Lindahl Aff. Ex. 3 (yield spread premium is "not" buying a referral of a "mortgage loan," but instead is paying for all the broker's work that is necessary to create a loan, such as, for example, the loan "documents" (goods) and all the "tasks to get the mortgage to closing" (services)); Kapp Aff. ¶ 41, Maclin Aff. Ex. 4. *See also* Burke Dep. at 21, Lindahl Aff. Ex. 4 (YSPs are "payment for . . .goods and services provided"); Maher Dep. at 69, Lindahl Aff. Ex. 5 (YSPs are "payment to a broker as part of the costs . . . for services rendered by the broker in order for us to acquire the loan"); Pacifici Dep. at 59-60, Lindahl Aff. Ex. 6 (the company knows that services are provided because of the evidence in the loan file). At a minimum, it is clear that there has been no concession that respondent's use of yield spread premiums constitutes a referral proscribed by Section 8. Indeed, if such a concession had been made, it is difficult to understand why the Court would feel obliged to review in this case the broader statutory issue concerning the legality of yield spread premiums.

judgment about where to draw the statutory line between permissible and unlawful. The Court should wait for such a case before granting certiorari.

B. Not only is this case in the wrong procedural posture for deciding the meaning of Section 8, but also the legal issue is distinctly unripe for this Court's review. As petitioners' second question makes plain, the proper resolution of how to interpret Section 8 depends heavily on how HUD applies the statute and what deference is owed to the Department's expertise. But only one court of appeals has had an opportunity to review the question subsequent to the issuance of HUD's 2001 Policy Statement.

Petitioners place primary reliance (Pet. 15-20) on the asserted conflict between the Eleventh Circuit in *Culpepper* and the decision below. But whether that conflict survives HUD's most recent pronouncement is pure guesswork. The Eleventh Circuit took pains to find HUD's 1999 Policy Statement "ambiguous" (*Culpepper v. Irwin Mortgage Corp.*, 253 F.3d 1324, 1327 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 930 (2002)), and as the Eighth Circuit correctly observed below, HUD's opinion that yield spread premiums should be decided loan-by-loan could not be more "clearly stated." Pet. App. 16a n.9. This Court should follow the lead of the Eighth Circuit and "not conjecture whether [the Eleventh Circuit] will remain steadfast in its position . . . now that HUD has clearly stated that it differs with the analysis made in *Culpepper*."[11] *Id.* If the Eleventh Circuit is intrepid enough to ignore HUD's expertise and experience, then the Court can

---

[11] After HUD issued its 2001 Policy Statement, the Eleventh Circuit asked for supplemental briefing on the deference issue in three other cases involving Section 8 that were then and still are pending. App. 1a-6a. Moreover, the district court assigned to the *Culpepper* case on remand formally stayed all proceedings to await the Eleventh Circuit's decision in those cases. Thus, contrary to petitioners' suggestion, there is reason to believe that the Eleventh Circuit may reconsider its interpretation of Section 8 in light of HUD's intervening action.

review the issue at that time in a case involving Section 8 liability.[12]

C. Petitioners' arguments on the merits provide no reason for the Court to grant certiorari. All they do is parrot the holding of the district court that the size of the premium must be dependent on the particular services provided by the broker in order to withstand scrutiny under Section 8. Of course, this assertion merely begs the question as to what precisely Section 8 proscribes. There is nothing in the undefined phrase "shall be referred" in Section 8(a) that indicates that the inquiry must be aimed exclusively at the lender's conduct in setting the premium. Moreover, Section 8(c)'s focus on services, goods or facilities "actually furnished" or "actually performed" does not explicitly or implicitly indicate that the fee structure must be tailored to the precise services, goods or facilities provided for each loan.

The Eighth Circuit is clearly correct that HUD's Policy Statement reconciles the tension between subsections (a) and (c) by making certain that actual goods or services are provided and then ensuring that payments for those goods or

---

[12] Petitioners mention two other cases in passing, but neither conflicts with either the holding below or HUD's 2001 Policy Statement. *See Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 118 F.3d 1157 (7th Cir. 1997); *Aiea Lani Corp. v. Hawaii Escrow & Title, Inc.*, 647 P.2d 257 (Haw. 1982). Neither case involved a yield spread premium. Moreover, both cases involved loan-specific analyses. In *Lawyers Title* the broker charged three times as much for use of office space at loan closings involving one particular lender and the court held that "[t]he only plausible explanation" was that the premium was "for steering its borrowers" to the lender. 118 F.3d at 1162. Assuming HUD's two-part test applies outside the yield spread premium context, it is clear that the excess paid over the "market" would have been just as impermissible under the 2001 Policy Statement. Similarly, in *Aiea Lani*, the developer received a 90% discount on title insurance for an entire project if it agreed to steer each purchaser of a specific unit to purchase title insurance from the same company. 647 P.2d at 258. This was a naked referral agreement, which is illegal under any interpretation of Section 8.

services are reasonable. Pet. App. 17a. It is plain that under this approach the borrowers are protected from unnecessarily high charges, which is what RESPA is ultimately aimed at ensuring, and also that not all yield spread premiums are per se legal. HUD Statement of Policy, 2001-1, 66 Fed. Reg. at 5302, Pet. App. 89a. In stark contrast, under petitioners' standard all existing yield spread premiums are illegal. Pet. App. 16a ("In the context of the residential loan industry as it exists today, we have difficulty seeing many, if any, factual situations in which a [yield spread premium] could lawfully coexist with their contentions").[13]

Of course, this debate on the merits is beside the point. The correctness of the decision below is no basis for granting certiorari. When a real conflict arises in a case on the merits, the Court can deal with petitioners' merits arguments. No reason exists to take up that issue here and now.

II.

Recognizing the weakness of seeking review of the Section 8 issue in the wrong kind of case and without a conflict in the circuits, petitioners stretch (Pet. 20-30) to present a more abstract question concerning the proper deference owed to HUD's Policy Statement. This question is no more worthy of review than the first one. Indeed, the very fact that the Court must decide the second question before it can properly decide

---

[13] The validity of the Eighth Circuit's position is reflected in petitioners' contrived effort (Pet. 14 n.7) to concoct a circumstance in which a yield spread premium would be lawful. They would approve such a premium if the lender imposed disclosure obligations on the broker to inform borrowers of the financing arrangement and if the lender "took steps to ensure that brokers actually used the entirety" of the premium to offset closing costs. Because the premium typically is set on the basis of the interest rate, this is merely another way of saying that yield spread premiums are per se unlawful because they fail to take into account the brokers' conduct.

the first one is another reason why the Court should deny the petition.

As petitioners must concede, the court below concluded that HUD's Policy Statement was owed deference on two distinct legal theories – *Seminole Rock* and *Skidmore*. Thus, the deference issue here is much more complicated than it might be in another case where only one theory of deference were available. As it happens neither deference issue warrants this Court's review.

A. Petitioners focus primarily (Pet. 20-26) on *Seminole Rock* deference. Here, the statute is ambiguous and the regulations also do not resolve the issue directly. The issue becomes what effect should be given to an agency's efforts to clarify these ambiguities through a mechanism other than formal rulemaking. This Court in *Seminole Rock* and its progeny certainly has recognized that an agency's interpretation of its own ambiguous regulation can be "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

To be sure, this Court in *United States v. Mead Corp.*, 533 U.S. 218 (2001), has raised the bar on what kind of agency action is entitled to deference. The Court focused on what "Congress would expect" from an agency faced with ambiguity. *Id.* at 229. From this petitioners argue that a Policy Statement by HUD is not sufficient to trigger *Seminole Rock* deference in light of the gloss in *Mead* that expresses a preference for notice and comment rulemaking. The problem with this theory is that it ignores both the statutory authority Congress conferred upon HUD and Congress's actions in 1999 that reflect its understanding of that authority. *See supra* at 4 (Conference Committee orders HUD to clarify its interpretation). Thus, HUD has not merely been delegated rulemaking authority. To the contrary Section 19(a) of

RESPA broadly grants HUD authority not only "to prescribe such rules and regulations," but also independently "to make such interpretations . . . as may be necessary to achieve the purposes of this chapter." 12 U.S.C. § 2617(a). Unless the second grant of authority is treated as mere surplusage, it stands on a par with Congress's delegation of rulemaking power and even under *Mead* should be entitled to controlling weight.[14]

At a minimum, the unusual grant of interpretative authority embodied in RESPA puts a wrinkle on the deference question that undermines any claim that it warrants this Court's attention. None of the court of appeals cases cited by petitioners (Pet. 23, 25) as conflicting on the broader question of how to resolve ambiguous regulations involved such an express grant of power. The Court should resolve the precise issue presented by petitioners, if at all, in a case involving a statute without this unique language.

B. Finally, even assuming that petitioners' statutory argument warranted review and HUD's interpretation is not entitled to *Seminole Rock* deference, petitioners still cannot prevail unless this Court also agrees to decide the Eighth Circuit's alternative holding that HUD's Policy Statement is entitled at least to *Skidmore* deference. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Petitioners assertion (Pet. 26-30) that this issue also warrants certiorari is plainly without merit. Indeed, petitioners do not even raise the *Skidmore* issue directly in their second question presented. *See id.* at *i*.

---

[14] Petitioners attempt to soft pedal this problem by asserting that this grant of authority is no different than the Secretary of Treasury's authority to "establish[] procedures" for issuing certain rulings. Pet. 21 n.9 (alteration in original, internal quotation marks omitted). This argument is facially implausible. "On the face of the statute" Congress clearly granted HUD interpretative authority on a par with its rulemaking powers. *Mead Corp.* 533 U.S. at 231.

The court of appeals found that "HUD's Policy Statements . . . pack sufficient power to persuade given HUD's specialized mission, experience and broad investigation into the consumer lending market" to warrant *Skidmore* deference. Pet. App. 13a. It is difficult to imagine a more case-specific holding, which makes it inherently unworthy of further review by this Court. In any event, petitioners offer no persuasive reason for granting certiorari.

Petitioners' *Skidmore* argument (Pet. 27-29) is wholly premised on the notion that HUD's interpretation of Section 8 has been inconsistent over time. This is mere wishful thinking. HUD's position in 2001 merely clarified its previous interpretation. Indeed, the clarification was aimed solely at rejecting a strained misreading by the Eleventh Circuit. HUD's interpretation has been settled since at least 1999, that actual and legitimate services must be provided by the broker and the total compensation received must be reasonable in light of the services and facilities involved and in light of market conditions. Nothing in the language of any of the sources cited by petitioners (Pet. 28) remotely conflicts with HUD's current Statement. Petitioners' additional dismissal (*id.* at 29 n.14) of HUD's interpretation as lacking "valid[ity]" and "thoroughness" is simply a rehash of its merits arguments, is rebutted by any fair reading of HUD's Statements themselves, and again provides no basis for this Court's review.

Given the complete absence of any conflict among the courts of appeals actually applying *Skidmore*, petitioners argue that courts of appeals have held that an administrative agency cannot "change its 'authoritative . . . interpretation' of a regulation 'without notice and comment.'" Pet. 29 (omission in original) (citing cases for the same proposition); *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1035-36 (D.C. Cir. 1999). Of course, the premise of this argument is completely missing here. There has been no "fundamental change" in HUD's interpretation and thus no basis for

criticizing its approach, assuming of course that HUD's broad statutory grant of authority to interpret the laws does not obviate the need for rulemaking in any event.

* * * *

There may come a day when the Court will have to decide the proper interpretation of Section 8 of RESPA, but this is not that day. Certainly, the Court can and should wait until the lower courts have an opportunity to scrutinize HUD's 2001 Policy Statement and opine on its validity. As the Eighth Circuit observed (Pet. App. 16a n.9), it is pure "conjecture" as to whether the Eleventh Circuit "would reach a different result in a subsequent case in light of HUD's 2001 Policy Statement." Pet. 18. That kind of speculation provides a reason not to grant certiorari; it certainly supplies no reason for this Court to intervene prematurely.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

DALE I. LARSON*
LARSON KING, LLP
2800 Minnesota World Trade Center
30 East Seventh Street
Saint Paul, Minnesota 55101
(651) 312-6500

Counsel for Respondent

* Counsel of Record

May 23, 2002

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Nov 07, 2001]

No. 99-11554 TT / 00-11837-TT

BETH A. RICHARDSON,
Plaintiff-Appellant,

versus

BANKAMERICA CORPORATION, a Delaware corporation
BANK OF AMERICA FSB, INC., a Hawaii corportion,
Incorportated under the Laws of the United States of
America, d.b.a. BankAmerica Mortgage,
Defendants-Appellees.

PAMELA C. HIRSCH, individually, and on behalf of all others
similarly situated, DAVID L. HIRSCH,
Plaintiffs-Appellants,

versus

BANKAMERICA CORPORTION, a Delaware corporation,
BANK OF AMERICA FSB, INC., a Hawaii corporation,
BANKAMERICA MORTGAGE, a divsion of BankAmerica FSB,
a Hawaii Corporation,
Defendants-Apllellees.

Appeal from the United States District Court
for the Northern District of Georgia

ORDER:

Motion of Appellants in appeal nos. 99-11554 and 00-11837 to file supplemental briefs addressing the Department of Housing and Urban Development's RESPA Statement of Policy 2001-1 of October 18, 2001 is GRANTED. Appellants's brief shall not exceed 16 double-spaced pages and shall be filed no later that 21 November 2001. Applellees' reply brief shall not exceed 16 double-spaced pages and shall be filed no later than 14 days after receipt of Appellants' brief.

Please contact Matt Davidson at 404-335-6224 to confirm receipt of these directions no later than 4 o'clock p.m. on Wednesday, 7 November 2001.

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVETH CIRCUIT

[Filed Nov 07, 2001]

No. 99-14066

DENIEL HEIMMERMANN, individually and on behalf of themselves and class described, EMILY HEIMMERMANN, individually and on behalf of themselves and a class described,

Plaintiffs-Appellees,

versus

FIRST UNION MORTGAGE CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

ORDER:

The parties are requested to file supplemental briefs addressing the department of Housing and Urban Development's RESPA Statement of Policy 2001-1 of October 18, 2001. Appellant First Union Mortgage Corporation's brief shall not exceed 15 double-spaced pages and shall be filed no later than 21 November 2001. Appellee Daniel Heimmermann's reply brief shall not exceed 15 double-spaced pages and shall be filed no later than 14 days after receipt of Appellant's brief.

Please contact Matt Davidson at 404-335-6224 to confirm receipt of these directions no later than 4 o'clock p.m. on Wednesday, 7 November 2001.

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Nov 07, 2001]

No. 99-12110

SCOTT R. MCBRIDE, JR., On behalf of himself and all others similarly situated,

Plaintiff-Appellant,

versus

RELIASTAR MORTGAGE CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

ORDER:

The parties are requested to file supplemental briefs addressing the Department of Housing and Urban Development's RESPA Statement of Policy 2001-1 of October 18, 2001. Appellee Reliastar Mortgage Corportion's brief shall not exceed 15 double-spaced pages and shall be filed no later than 21 November 2001. Appellant Scott McBride's reply brief shall not exceed 15 double-spaced pages and shall be filed no later no later than 14 days after receipt of Appellee's brief.

Please contact Matt Davidson at 404-335-6224 to confirm receipt of these directions no later than 4 o'clock p.m. on Wednesday, 7 November 2001.

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE